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Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 245.

HENRY CLEWS et al.,
Petitioners,
vs.
MALCOLM M. JAMIESON et al.,
Respondents.

Certiorari to the Circuit Court of Appeals, Seventh Circuit.

Brief for Respondents Jamieson & Co., in Reply to the Brief on Behalf of the Stock Exchange.

SAMUEL P. McCONNELL,
HORACE KENT TENNEY,
M. LESTER COFFEEN,
CHARLES F. HARDING,
JAMES H. WILKERSON,
Solicitors for Respondents Jamieson & Co.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

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IN THE

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Brief for Respondents Jamieson & Co., in Reply to the Brief on Behalf of the Stock Exchange.

Since writing and filing our original brief in this case, the counsel for the Governing Committee of the Stock Exchange have prepared and served upon us their brief, which is devoted to an attack upon our side of the case.

The Governing Committee thus seek in this court a reversal of the decree which in their answer they asked the Circuit Court to enter, viz: a dismissal for want of equity. (Trans., p. 27.) This brief, though presented as a respondent's brief, is in reality a brief for the petitioners; and we therefore present this reply to some of the points which it discusses.

I.

THE CLAIM THAT CLEWS & CO. KNEW OF AND ASSENTED TO THE PRACTICE OF THE STOCK EXCHANGE, AS THAT PRACTICE IS CONSTRUED BY OPPOSING COUNSEL.

The decision of the mere question whether Clews & Co. knew, or are presumed to have known, of the rules of the Exchange, does not advance us one step in deciding what those rules are, or what is the effect of their operation. For if the effect of action under those rules did not produce a contract under which Clews & Co. could maintain a bill in equity against Jamieson & Co., then the dismissal of the bill was concededly correct.

The rule being established by this court that customs which work a substantial change in the seller's rights, and transform his contract into something materially different from that which he authorized, do not bind him in the absence of affirmative proof that he actually knew of them when he gave his order, counsel seek to bring this case within that rule.

They admit—at least by necessary implication—that there is no evidence of *actual* knowledge by Clews & Co., either of the rules of the Exchange, or of the remarkable construction of those rules upon which the theory of this case rests. Whether admitted or not, it certainly is true that there is no such evidence; and that it is only by inference or presumption that such knowledge can be acted upon as a fact in the case. This inference is based upon the use by them of the word "account" in their orders to Schwartz, Dupee & Co.

From the cases collated in the briefs in this case it is clear that the word "account" is used in stock exchanges

in England and in this country to describe sales for future delivery, as distinguished from those in which the stock is to be delivered at once. And in the evidence in this case this is the exact meaning given to it by the witness who was called to define it. He says—being asked to interpret the meaning of the dispatch, "Sell 500 Diamond Match at 220 and a half account"—that "It means 500 shares of stock which is to be deilvered and paid for and taken at the end of July," and that a broker in filling the order would make such a sale. (Trans., p. 110.)

Here is the complainant's own translation of their own order, and it is a simple statement of a plain contract. Nothing in the evidence by which the methods of the Clearing House are explained warrants the presumption either that it is an essential part of a sale "for the account" that it should be transformed so greatly and so often, or that Clews & Co. had any intention of entering into transactions so widely different from those which they authorized. If it be assumed that they were willing to deliver the stock to any other than the original purchaser, and to accept him without reference to his responsibility, and to assent to a change in price on having the "difference settled," this does not warrant the presumption that they assented in advance, or gave authority in advance, to the substitution of a contract by which they were personally bound to deliver a much greater number of shares for a much smaller price. Nor does it warrant the presumption that they assented to the entire obliteration of their contract, by their broker so offsetting it that he is left without even a subsituted obligation to deliver stock to anyone.

As an illustration of what it is said they presumptively authorized, look at the sale of 200 shares on July 27th and apply petitioners' theory to it.

For the July account they bought from and sold to R. A. Peters 350 shares at 226¾. *Result nothing; no subsisting contract with anyone.*

For the August account they bought from and sold to Peters 350 shares at 229. Result of these two transactions, nothing; at the end of that day, they were just where they were when the Exchange opened, viz, with 500 shares sold—by substitution—to two other brokers. Can it be *presumed* that Clews & Co. consciously authorized the making and simultaneous cancellation of a sale, without the substitution of anyone who stood as a buyer even to their brokers?

But by the stipulated facts the original contracts which were made for Clews & Co. were not cancelled by the clearing house substitutions, but remained in force. If Clews & Co., either actually or presumptively, assented to any use by their brokers of these contracts in the Clearing House, it was, therefore, to a use which did not destroy their original obligation upon the principals. This is admitted, and the concession destroys the basis upon which the theory of a succession of new contracts to which they were parties is founded. There were no such new contracts to which they were parties. In the nature of things they could not be, at the same time, parties to the old contract, and also to a new contract which was *substituted* for it.

It is said that Clews & Co. are themselves brokers in New York, and, therefore, presumptively familiar with the rules of the Exchange in Chicago. There is no evidence that they are brokers, unless that follows from the bare statement that they are the correspondents of Schwartz, Dupee & Co. But the rule which is applied

here must be one which will also apply to any man who orders a sale "for the account." If there is room for presumption in any such case, as to the details or construction of the contract, there cannot be a presumed intention or authority to change its intrinsic nature.

No argument is presented by counsel for the Stock Exchange which takes into account the admitted fact that the original contracts remain in force as between the principals, and between the principals and the brokers. Their presentation of the case is upon a hypothetical basis which is not sustained by the record.

It is suggested by counsel for the Exchange that added force is given to their contention by the fact that Mr. Jamieson, one of the three partners in the firm of Jamieson & Co., was president of the Exchange at the time of these transactions. And it is said that for this reason the firm "can not be heard to say that such was not the contract that they entered into." (Brief, pp. 95–6.) We confess to some surprise at this suggestion on behalf of a party who professes to seek only a decision sustainng the rules of the Exchange, and a particular construction of contracts made under them. For the suggestion really means that these rules and contracts have a greater effeet against the president and his firm than against other members. So far as the fact is concerned, it is true that Mr. Jamieson was president of the Exchange, and the evidence shows—and shows nothing further—that he did not object to the resolution of the Governing Committee to close the Exchange. (Trans., p. 119–20.) Whether his failure to vote was caused by the fact that presiding officers ordinarily do not vote, or by some other equally good reason, is a question which is both immaterial and unanswered by the evidence in this case. It is clear that nothing that he

could have done, or left undone, in his official capacity would have changed the rules, or affected in any way the terms or the construction of a contract which resulted from the operation of the rules. And to say that because of his position his firm cannot be heard to deny the construction which adverse parties put upon either the rules or the contract, is to take a position which is lightly characterized as untenable.

Of equal dignity with this argument is the claim that Jamieson & Co. "have interpreted this contract in the same manner that the plaintiffs in this case interpret it" (Brief, p. 96), by settling with Schwartz, Dupee & Co. for whatever liability arose with respect to 450 shares of the 1,150 covered by the contract of August 3. All that the evidence shows is that at some time—the witness being unable to state that it was before the commencement of this suit—"Schwartz, Dupee & Co. settled with Jamieson & Co. for the 450 shares of the 1,150 shares which had been substituted on August 3." (Trans., p. 140–1.) Just why the ordinary right of compromising a claim should be denied to Jamieson & Co., or why a settlement with one claimant should admit their liability to another, we have not been able to perceive. Nothing is shown as to the terms of this settlement; and the meagre statement with regard to it shows action consistent rather than inconsistent with our contention. For Jamieson & Co. did not admit their liability to the principal whom Schwartz, Dupee & Co. represented with reference to the 450 shares, nor settle with that principal. On the contrary, they settled with the brokers who alone, upon their contention, were parties to the contract of August 3.

It is obvious, also, that if Schwartz, Dupee & Co. waited for the opening of the Exchange, and then closed out the 450

shares in the manner required by its rules, a different question would be presented as to the liability of Jamieson & Co. And that liability they might compromise, or pay in full without in any way recognizing, even by implication, the correctness of the position now taken by Clews & Co.

Counsel further say that our admission that Schwartz Dupee & Co. have no claim against the $14,000 placed in the Clearing House "estops Jamieson & Co. from claiming the transaction was not the transaction of Clews & Co." (Brief, p. 97.) We might pertinently inquire how such an admission could change the construction of the rules or the contracts made on the exchange, in which questions alone the Exchange professes to be interested. But does the elimination of an interest in Schwartz, Dupee & Co. in the fund concede that Clews & Co. were parties to the contract? The question answers itself. Mr. Comstock's testimony shows that Schwartz, Dupee & Co. have no interest in the fund, except as agents for Clews & Co., to whom they would have to account for it when collected. (Trans., p. 142.)

In this connection counsel also say that this "trust fund was from time to time drawn against and made good by the parties right straight along." (Brief, p. 97.) This statement is repeated in other parts of the brief, as well as in the brief of counsel for petitioners; and upon it is erected the entire fabric of the argument by which they seek to show the validity of "equating" by settlement of differences, and to explain how a sale at $229 is equivalent to a sale at $222. These statements are at variance with the conceded facts. In the first place, the bill itself alleges that the deposit was made when the contract of August 3d for 1,150 shares was entered into. (Trans.,

p. 57.) The answers of the Governing Committee and of Jamieson & Co. expressly state that the deposit was made on August 3d. (Trans., p. 27, 63.) It is thus admitted in the pleadings that this fund was not created until August 3d. How a fund created on the day the Exchange closed could be "drawn against and made good right straight along" we leave to explanation by our adversaries. If money was deposited before that time, there is neither averment of it in the pleadings, nor proof of it in the evidence. Counsel's statement that the rules require such deposit, and therefore it must have been made, can hardly supply the place of evidence of a fact upon which the theory of their argument is based.

So far as the 200-share sale on July 27th is concerned, there clearly was no deposit made on that; for it was offset by a simultaneous purchase, and a deposit, if made, would have been thereby released.

II.

THE EFFECT OF CHANGING OVER THE SALES FROM THE JULY TO THE AUGUST ACCOUNT.

Counsel for the Stock Exchange have devoted a large part of their brief to an explanation of the process of changing over sales from one account, or month, to the next. And upon this explanation, and the various features involved in it, they base much of their argument, both on the question of the legality of the contract and the effect of the substitutions through the Clearing House.

The gist of this explanation is, that "changing over" is accomplished by buying for the July account and selling to the same broker for the August account at an advanced price. As an example of this, and for the purpose of

graphically illustrating the exact procedure, they point out the entries in the Clearing House sheet of Schwartz, Dupee & Co. for July 25th, the day when they "changed over" the 500 shares to the August account. (Trans., p. 67.) That sheet shows four purchases, aggregating 500 shares, from four different brokers at $227 for the July account, and no sales *for that account.* It also shows corresponding sales for the August account to the same brokers at $229, and no *purchases for that account.*

This, counsel say, shows an actual and legitimate transaction, and demonstrates the soundness of their argument. Now whether the explanation is created to fit the figures, or not, is perhaps not material, for the figures are there. But this argument and the explanation which it is intended to sustain must fit all similar cases. And when we look for similar figures and a similar result, on the changing over of the 200 shares, we not only do not find them, but we find figures which destroy the explanation and show that such a contract as petitioners rely on actually did not result.

The "changing over" of the 200 shares was on July 27, and we should expect to find merely a purchase for July—without any off-setting *sale for that account*—and a sale for August—and again without any off-setting purchase *for that account*—to the same broker, of 200 shares. But we do not find this at all. On the contrary, there was no 200-share transaction at all, either in one amount or as the aggregate of several transactions. The only purchases and sales were of 350 shares. The brokers thus included in one sale 200 shares for Clews & Co. and 150 shares for some other client. ((Stipulation of Facts, Trans., p. 77.) It is not pretended that there was any rule or custom of the Exchange warranting this, and under the decision of

Beckhuson v. *Hamblet, supra,* and the general principles of law, that contract did not bind Clews & Co. and could not have been enforced against them. This alone would defeat petitioners; for the creation of this contract, and its subsequent imposition on Jamieson & Co., is absolutely essential to their case.

But we are considering now only this question of "changing over" to the August account. Treating, therefore, for the present, this 350 transaction as representing Clews & Co.'s order, we find this marked difference between it and the 500-share transaction. In the 500-share "change over" there was a purchase of 500 shares for July, and *no sale for that month;* and a sale of 500 to the same brokers for August, and *no purchase for that month.* The purchase for July thus matches the sale for August, and matches nothing else. But in this 200-share—or 350-share—transaction, all is different. There is a purchase from Peters of 350 shares at $226\frac{3}{4}$ for July, *but there is also a sale to him of the same amount at the same price, for the same account.* The July account was thus balanced, and there was nothing to change over to the August account, and to make the basis of an actual transaction. And turning now to the transactions for August on the same sheet, we find a sale of 350 shares to Peters at $229, which counsel say represents the "change over" of Clews & Co.'s sale; but we also find a purchase of the same amount at the same price from Peters, thus cancelling this transaction also. The Clearing House sheet itself enters them as cancellations, and carries forward only the *balance from the preceding day.* (Trans., p. 70.)

Now the proposition which counsel seek to maintain is, that these clearing house deals not only preserved, but created, a succession of contracts on which some definitely

ascertained person became each day liable to Clews & Co. to receive 700 shares of stock, and who could enforce the delivery of that number from them. Their assertion is, that "somebody is the purchaser during all the intervening time" (preceding the account day). (Brief, p. 72.) But here, in the very inception of the transaction on which the suit is based, the contrary of this result is shown. The obligation *even of Schwartz, Dupee & Co.* was not increased beyond the 500-share transaction of the previous day. They did not have contracts with anyone aggregating 700 shares. There is not room for dispute over this fact—or over its legal consequences.

Were these transactions, whose existence was just long enough to record their extinction, "actual sales"?

Counsel, however, say that the purchase of 350 shares for July must not be treated as cancelling the sale for that account, nor the purchase of 350 for August as cancelling the sale for the August account; but the court *must assume* that these remarkable coincidences mean merely that some other buying customer was also "carrying over" on the same day. The complete agreement of amounts, prices, names, etc., would seem to call for some evidence on which to base such a proposition, if a court is to act on it. But if the fact were so, of which there is concededly no evidence, it would not change the result, nor illustrate how 700 shares could be deliverable on contracts calling for only 500.

Let us, however, consider the question from the standpoint of this other customer. He, it will be seen, was, by the statement of counsel, a *buyer* for July, who wished to "change over" to August, and thus be a *buyer* still for that month. (Brief, p. 90.) For him, therefore, counsel

say Schwartz, Dupee & Co. sold for July—thus cancelling his July purchase, and *bought* for August, thus giving him a contract of purchase for that month. But what became of that purchase, and the contract which is supposed to have been made for him, and to have bound some one to deliver to him? Schwartz, Dupee & Co.'s sheet shows that they had, as the result of that day's transactions, *no contracts of purchase at all.* (Trans., p. 70.) Their sheet for the next day shows that they had no contracts of purchase (either original or by substitution.) (Trans., p. 71), and it was not until July 29th, when the stock had dropped to $222¾, that they were buyers at all, and then only for 300 shares for other clients. (Trans., p. 73.) And these 300 shares were more than offset by their sales, so that their clearing house sheet showed them sellers, and sellers only, for 1,100 shares. On no subsequent day did they buy any stock. In other words, these brokers, who are said to have kept their purchasing customers' contract constantly in force by a daily substituted seller, did not even themselves have on or after the day of purchase *any contracts of purchase at all.*

The stipulation of facts show that the sale of 350 shares on July 28th, shown in the sheet of Schwartz, Dupee & Co. for that day, was made for the client for whom the purchase of that number on July 27th was made, and that it was "to close his purchase." (Trans., p. 78.) In view of the conceded fact that his purchase was already off-set by a contemporaneous sale, and that his brokers had, on July 28th, no contract of purchase outstanding, this is interesting on the question of the *actuality* of these transactions. What was there in this more than book-keeping?

These rules and customs of the Exchange must operate equally for the protection of the rights of all who deal on the Exchange. They are not for the exclusive benefit of Clews & Co., and the latter have no more right to claim a substituted contract for their own benefit than any other customer of Schwartz, Dupee & Co., of whose contract or sale the substitution was the resultant. If these transactions did not serve to either keep alive, or to create, whichever it is, the purchase contract of this other customer, if there were any such, then they had no greater efficacy in creating rights in favor of Clews & Co.

As against this theory of unreal transactions, whose invalidity can with difficulty be concealed, we present the admitted fact which makes these Stock Exchange transactions simple, reasonable and valid, *viz.*, that the original contracts remain in force so far as the principals are concerned, and the new substituted contracts impose direct liability only on the brokers.

III.

THE ILLINOIS AND ENGLISH DECISIONS, WHICH ARE CITED TO SUSTAIN THE THEORY THAT VALID CONTRACTS ARE MADE BY THE PROCESS OF SUBSTITUTION.

It is contended that the Illinois decisions sustain the legality and effectiveness of settlements on the Board of Trade by the process of "ringing up," and that this is but another form of doing the work performed by the Clearing House. This argument is mainly directed to the question of gambling or option contracts, but it is claimed that the same reasoning applies to the question of the effect of the cancellations and substitutions shown in this case.

A distinction, clear in itself, and clearly stated by the courts, between the custom involved in those cases and that which is relied upon here, exists in this fact: In all those cases the substitution put in place of the original buyer an actually ascertained person, who had a contract identical in all its terms, except price, the price being settled in money. In this way the identity of the seller's contract was preserved, instead of being, as here, merged with many others, resulting in a contract for a different number of shares, and as often leaving the seller with no contract at all. If the contracts of different sellers are thus kept separate, and the only change is that a new buyer is substituted, who, by a money payment makes up the difference in price, there is no inherent difficulty in *making* such new contracts. But this separation is distinctly recognized as the essential element which renders the scheme legal and possible.

In *Oldershaw* v. *Knowles*, 4 App. Ct., 63, upon which counsel rely, it was said, speaking of the rejection of evidence of the practice:

"If the evidence offered had been admitted it would have appeared that by a general and uniform custom upon the Board of Trade, settlements of this character were made and *another responsible seller of the same commodity substituted for the one originally furnished to the customer.*"

The court further said that by the terms of the offer of evidence, it was to be shown that the broker obtained no interest in the contract, but that the effect of the settlement was merely to discharge the original seller by substituting another responsible seller *for whom the broker had already made an equivalent sale,* making the new seller liable to deliver the lard through the broker in the place of the original seller.

When this case was again before the Appellate Court (6 App. Ct., 325), the court said:

"According to the custom in question, a commission merchant can be a party to such a clearance or settlement *only when he appears in one contract as a purchaser and in another as a vendor of the same amount* of a particular commodity for the same delivery. If he is dealing as a commission merchant solely, and not on his own account, *he must have made a purchase for one customer and a contract of sale for the same amount* for the same or some other customer, both for the same delivery. *The contracts must necessarily be identical in terms in all respects except as to price.*"

No case is cited in which the contracts of all the brokers are mingled together and in which no new purchaser is substituted, who is obliged to take from the seller the number of shares which he has contracted to deliver.

The decision in *Partridge* v. *Cutler*, 68 Applt. Ct., 569, was reversed by the Supreme Court (168 Ill., 504), and therefore can hardly be considered as establishing the law, especially as the Illinois statute provides that decisions of the Appellate Court shall not be binding in other cases.

The case of *Lyon* v. *Culbertson*, 83 Ill., 33, cited by counsel, holds that a rule which provides that on default in putting up margins, the contract might be considered closed at the market price, is illegal, and in condemning it the court said:

"When they, by agreement, dispense with a performance, or at least an offer to perform, then they render the contract obnoxious to the law of contracts. (*Pickering* v. *Case*, 79 Ill., 328.) It is this effort which stamps it as being in the nature of a gaming contract. It is this effort which characterizes the transaction and renders it illegal."

In the English cases and the practice under the rules of the London Stock Exchange, this preservation of the separate identity of the seller's contract is recognized.

The case of *Nickalls* v. *Merry*, 7 L. R. Eng. & Irish Appeals, was a case decided by the House of Lords after the decisions in the two cases of *Maxted* v. *Paine*. In that case the jobber, answering in our case to the buying broker, having re-sold the shares, received from his purchaser and delivered to the seller's broker the name of L. as the ultimate purchaser, and the transfer was made by the seller to L., who paid for the shares. The company being insolvent, M. was compelled to pay assessments on them, the transfer to L. not having been registered. It turned out that L. was an infant, and legally incapable of accepting a transfer of the shares. In a suit by M. against the purchasing jobber on the exchange, it was held that the liability of the latter as the first contracting buyer was not discharged by the mere giving of the name of L., and the acceptance of it by the seller, but that the custom of the Stock Echange required him to present a purchaser actually able to carry out the purchase, and not having done so, he was not discharged. Lord Cairns, in deciding the case, said:

"The whole object (of the custom) being by means of the first contract to obtain a real purchaser of the shares, it would be in the highest degree irrational to suppose that this first contract could be fulfilled, except either by accepting and paying for the shares, or providing some person who would validly contract to do so."

Lord Chelmsford said in his opinion:

"The jobber does not fulfill his contract by merely giving to the selling broker any name as the purchaser of the shares, but only by giving the name of a person who is of ability to contract, and who has consented to become the purchaser. In other words, the jobber is bound to furnish the seller with the means of executing a transfer of the shares to a nominee against whom the obligation to take such transfer can be enforced, and thereby the seller

be relieved from all liability with respect to his shares; and until he has done so, the jobber has not performed his contract. * * * The jobber's contract, therefore, is of this description, it is at first a temporary and conditional contract, but it becomes absolute upon his failure to furnish by the name day the name of a person capable and willing to become the transferee of the shares, so that the seller, by executing a transfer, may make with him a new contract in substitution of the original one with the jobber."

Lord Hatherley in his opinion says, that when the seller's broker has made a contract of sale with a jobber or another broker, there arises a contract which is to be fulfilled in the first instance by the purchaser, but that the custom of the Stock Exchange permits the purchaser to give in substitution of his own name that of another person, who is to be the purchaser. That this same custom gives to the seller the opportunity of satisfying himself of the responsibility of the proposed purchaser, and rejecting him if not satisfactory. He therefore says that this very statement implies that there is a contract which can be transferred, and that there is a person to whom that contract is to be and can be transferred because he has authorized it, and that it is only when this has been done that the original purchaser is discharged.

These opinions of the different judges in this case show very clearly that all base their decisions upon the fact that under the practice on the London Stock Exchange the seller is given the name of the ultimate buyer, and the opportunity of entering into a new contract with him by the exercise of the ordinary right of election, which lies at the foundation of contracts.

Counsel for the Stock Exchange cite the case of *Anderson* v. *Beard*, L. R., 2 Q. B., 260, as if it were inconsistent with

the case of *Beckhuson* v. *Hamblet,* same volume, p. 18, and as if it were inconsistent with our position in this case. The contrary is true, as we understand that decision.

In that case a broker, on an order from the defendant, bought stock from the plaintiffs, and afterwards, upon direction of his principal, "carried over" the trade to the following month *with the plaintiffs.* It will be observed that this carrying over involved no transaction through the Clearing House or through other parties, but was arranged by the *parties to the original transaction itself,* and it thus amounted merely to a modification of the original contract. Before the account day the buyer's broker failed, and the plaintiff, learning that the defendant was the principal, sued him for damages occasioned by his refusal to take the shares, and the court held that he was entitled to recover.

Here, it will be seen that no question was involved of privity of contract between the principal on one side, and either the broker or principal on the other in the case of a substituted contract. The court expressly recognizes the fact that the parties to the original contract were the parties to the new arrangement of "carrying over" to the account, and held that the defendant, as the principal in that contract, was bound by it. Indeed, his liability was not contested; for the question which he raised was as to the measure of his damages, and he paid into court for the plaintiff's benefit the amount of damages, according to the rule, for which he contended.

The decision does not in any way limit the effect of the decision in *Beckhuson* v. *Hamblet.* In that case the court expressly held that if privity of contract existed between the principal and the broker of the other party, the con-

tract could be enforced; and it was upon the absence of such privity of contract that the decision was based, the court holding that "no contractual liability of the defendant to the plaintiffs ever existed in respect to this transaction."

The court further said that it was not necessary, according to the customs of the Stock Exchange, that a broker, in making contracts with other brokers, should even take care to create privity of contract between his client and the person with whom he contracts.

In short, the decision recognizes the fact that in many of the contracts made by brokers, and the transactions between them, they may be so made that although made on behalf of their clients, the latter are not parties to them, and cannot either enforce these contracts nor be held personally liable upon them.

In *Anderson* v. *Beard*, Matthews, J., in his opinion expressly says that he approves the decision of Kennedy, J., in the *Beckhuson* case, upon the question of privity of contract.

In his chapter on the London Stock Exchange, under the head "Relation of Broker to Client," Dos Passos says that in all these transactions the fundamental elements of agency exist, *i. e.*, that the broker makes the contract *for* his client, though his own money or credit may be used in the transaction. Such incidents of the transaction exist by virtue of the rules of the Exchange, and do not affect the ultimate relation which the parties bear to each other." (Dos Passos on Stock Brokers, pp. 280–3.)

He also cites the case of *Robinson* v. *Mollett*, L. R., 7 H. L. Eng. & I. App. Cases, 802. This was the case where the client gave two orders to buy tallow, one for 50 tons

and one for 200 tons, and the brokers notified him that they had done so. They had not, in fact, made special purchases for these amounts, but made contracts for larger amounts, in accordance with a custom of the market. The client having refused to receive the tallow the brokers sued him, and in the lower court recovered judgment. This judgment was reversed by the House of Lords, holding, among other things, that the custom of settling contracts by balancing purchases and sales between themselves amounted to a custom "to convert himself (the broker) from an agent to buy *for* his employer into a principal to sell to him," and that "a custom of trade may control the mode of performance of a contract; it cannot change its intrinsic nature."

Under the title, "Liability of Jobber to Vendor," on the questions arising under the English custom of passing the principal's name on the "name day," he quotes from cases which hold that the buying broker is discharged upon giving a ticket with the name to the ultimate purchaser, where the seller accepts the name and transfers the stock to him. And this is put upon the ground that the seller has an election to reject the proposed ultimate buyer (in which case the original buyer would have to furnish a new name), or to accept him and transfer the shares to him, and that when he adopted the latter course the first buyer was discharged. (Pages 300–1.)

He also refers to the decision in *Maxted* v. *Paine* (L. R., 4 Ex., 203),where the discharge of the first purchaser is expressly placed on the ground that the seller did not object to Goss (the ultimate and insolvent buyer), but executed a transfer to him (p. 303).

In all these English cases great stress is laid upon the

fact that the seller and ultimate buyer come into contact with each other through the medium of the ticket showing the ultimate buyer's name and the acceptance of it by the seller. The cases cited by Dos Passos, in which it has been held that privity of contract exists between the seller and the ultimate buyer, all contain this element, and the decisions seem to be based squarely upon it. He quotes as follows from a case in which a bill was filed by the seller to compel an ultimate purchaser to take shares which he had bought through the vendor's broker:

"The defendant first insists that there is no privity between himself and the plaintiffs, the original vendors. Undoubtedly upon the original transaction there was not; but * * * though the plaintiffs did not in the first instance agree to sell to the defendants, nor the defendants to purchase from the plaintiffs, yet when afterwards *they were brought together, and the defendant agreed to take the transfer and carried away the certificates, he adopted the whole contract and became the purchaser.*" (p. 320.)

Dos Passos states the result of the decisions on the question of the completion of the contract as follows:

"A contract between the vendor and the ultimate purchaser is complete when a ticket containing the name of the purchaser has been delivered *by his authority* to the vendor, and he *has accepted the name*, and indicated the acceptance by receiving the purchase money or in some other definite manner." (p. 232.)

By this method of using a ticket with the name of the buyer and the number of shares stated in it, there is a preservation of the elements of the original contract, sufficient at least for the purposes of making a contract between the parties by the acceptance of the ticket and the transfer of the shares. But this is radically different from holding that there is privity of contract between the seller on one side and the ultimate buying broker on the other, where

there is no ticket or other means of segregating the seller's contract, or the number of shares which he sold, from a general mass, made up as the resultant of a large number of contracts of purchase and sale, and by offsetting purchases against sales without attempting, either by the exchange of tickets or otherwise, to preserve the identity of original contracts, or to provide in any way a particular person who is *to be presented to the seller as his ultimate buyer*. This is the esential part of the English system. And when the buyer's name is thus presented to the seller *he is at liberty to reject him*, showing conclusively that privity of contract does not then exist between them, but is created by his acceptance of his name, and the transfer of the shares to him.

This practice of ultimately bringing the seller and the new buyer together, into an actual contract for the number of shares which the seller was to deliver and the buyer to receive, with liberty to the seller to reject the proposed buyer, makes such an essential difference between that system and the one involved in this clearing house method, that there is hardly room for comparison. It involves no question of cancelling the contracts of the principals, by substituting contracts for a different number of shares, or of mingling together the contracts of different customers.

IV.

THE DECISIONS OF THE CIRCUIT COURT AND THE COURT OF APPEALS.

It is urged by counsel that the decisions of both the lower courts are based upon a failure to understand the facts of the case—that is, to understand the facts as counsel claim

them to be. The alleged error of the Circuit judge is said to be a failure to understand that the difference in price was "equated" by paying the difference in money.

The alleged error of the Court of Appeals is said to be a failure to understand that there was no intention of settling by payment of differences, and that what the court thought was a payment of differences was merely the charge for carrying over the sales from the July to the August account.

The Circuit judge held that while the substitution on August 3rd created a contract between Schwartz, Dupee & Co. and Jamieson & Co., by which "the defendants were under obligation to take of Schwartz, Dupee & Co. during the month 1,150 shares of the stock in question, at $222." He further held that Clews & Co., were not parties to this contract, and that there could be no presumed assent on their part to a contract so widely variant in its terms from that which they had authorized.

Counsel assume that the only variance between the contract which Clews & Co., authorized and the contract of August 3rd was in the price of the stock. And this they say had, up to that time, been equated by payments to and withdrawals from the fund, which, as we have shown, was not deposited until August 3rd. But it was not in price alone that the contract which they authorized differed from that which they now seek to enforce as their own.

In the first place they never authorized one sale of 700 shares, but two separate sales, having no necessary connection with each other. It was their right to have these contracts kept separate; and if, as is said, they were brok-

ers, and themselves represented different customers in these two sales, this was far from being a matter of indifference to them and their clients.

But suppose we treat their sale as one for 700 shares. The contract of August 3rd was for 1,150 shares, and there can be no doubt, and it is not denied that it was an entire contract imposing upon the parties to it an obligation to deliver and receive that number, and not either a greater or less number. The damages for failure to deliver or receive would be measured by 1,150 shares and not by 700 or 500 or 200. If Clews & Co., were parties to that contract they would be personally liable on it to Jamieson & Co. if they failed to deliver the full number called for, and could not relieve themselves by a tender of 700. That the other client or clients of Schwartz, Dupee & Co., who were interested in the 450 shares, would be jointly liable with them, would not lessen their personal liability to the buyer; it would only furnish means of partial indemnity, if they were compelled to pay the full amount. That any one should even contemplete assuming such great and uncontrollable liability surely cannot be believed, much less presumed. The liability would be limited only by the character and extent of his broker's trades and their relation to the trades of all the other brokers.

To hold that Jamieson & Co. were liable to Clews & Co. for the decreased value of the stock after August 3rd, of course carries with it the concession that Clews & Co. would have been liable to them if the price had advanced. If on August 31st, the price had risen to $230 there would have been a profit to Jamieson & Co. of $8 per share on 1,150 shares, viz, $9,200. Could Jamieson & Co. hold

Clews & Co. personally liable for this loss if the stock was not delivered on the account day? To say that they could not is to admit that the contract did not bind Clews & Co. To say that they could is to hold them to a liability so variant from that of the contract which they authorized that it cannot be accepted as the transaction of a business man.

In saying that the Court of Appeals misunderstood the character of the transactions out of which this contract is said to have arisen, counsel forget that the decision is based upon the petitioners' own statement of the contract, which is quoted at length in the opinion. (Trans., p. 159.) In that statement the contract is plainly admitted to be a mere method of following the fluctuations of the market, and taking or paying the profits or losses which those fluctuations produce. And in their paraphrase of the instructions which, under the rules, they say their clients gave to the brokers, counsel conclude with these words which they attribute to Clews & Co. as expressing their *intention* in the transaction:

"For we have carefully studied this matter (*i. e.*, cancellations, substitutions and payment of differences), and we take it that by the process indicated we will be *in* or *out* on the day of delivery precisely *the difference between our original offer, and the then market price.*" (Trans., p. 159.)

This involves nothing relating to carrying over from one account to the next, or the payment of the charge therefor. It is a plain statement that the brokers can keep the contract alive or not as suits their convenience or the exigency of the market, the client concerning himself only with the amount which the difference in price shows he will be "in" or "out' on settlement day.

The theory of the transaction thus stated by counsel, to

which in substance they still adhere, gives to the contract so little permanence and such a fluctuating character as to make it in substance little more than an option contract. The broker is authorized to cancel the sale and substitute another at a higher or a lower figure as he sees fit; to merge it in the contracts of others, and then change this in turn; to offset the sale against a purchase so as to leave neither outstanding as a binding obligation. Taking that as its character the Court of Appeals held it to be within the Illinois statute which makes such contracts illegal whether the parties intend them as gambling devices or not.

This view of the transactions is the result of an attempt to impute to the customer an intention to have the terms of his contract change with the fluctuations of the market, and to become a party to contracts resulting from his broker's dealings for others. All this is obviated by holding, as the stipulation of facts states, that the customers' contracts continue in force as to them, and that the substituted contracts are only between the brokers.

Respectfully submitted,

SAMUEL P. MCCONNELL,
HORACE KENT TENNEY,
M. LESTER COFFEEN,
CHARLES F. HARDING,
JAMES H. WILKERSON,
Solicitors and Counsel for Respondents Jamieson & Co.

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